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No. 737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BLOOMFIELD STEAMSHIP COMPANY
Petitioner

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY BRIEF

The Memorandum of the Government says (page 3)*:

> "In any event, the question presented here is of no continuing importance."

This statement misses the point. According to the Court of Appeals, construction of the certificates requires a construction of the Shipping Act of 1916 under which,

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* The Memorandum supports this statement by a report of advice from the General Accounting Office that only two companies had executed "certificates such as those involved here" under "similar circumstances." This statement is valid only if the quoted phrases are used in a highly restrictive sense.

According to the report of the Maritime Administrator referred to at page 16 of the petition, in the year 1964, which the report says is the only year for which statistics are available, 11 of the 14 subsidized carriers, all seven of the "non-subsidized berth type operators" and the "irregular service carriers", who are treated as a group, participated in both "non-differential cargo" and "differential cargo" under Public Law 480 programs, that is to say, carried agricultural commodities at both U. S. flag and foreign flag rates. It may be that the Government as of the present moment defines "similar circumstances" to mean other parcel shipments on the same voyage. Cf. footnote 1, page 2, of the Government Memorandum. Further, after the decision in this case by the

as interpreted by the Court of Appeals, it is an illegal preference for a U. S.-flag carrier which has carried cargo required to be shipped U. S.-flag at a U. S.-flag differential rate to carry similar cargo not required to be shipped U. S.-flag at the world market rate. This construction is obviously of outstanding importance. If it is correct, U. S.-flag carriers are for practical purposes forbidden to carry agricultural commodities in bulk commercially (Petition pages 8-9).

If, on the other hand, the Government is now telling us that the Shipping Act has no such meaning—and indeed the Government's Memorandum fails even to mention the Shipping Act—and that Bloomfield did what it had a perfect right to do except that it was so stupid as to sign the certificates, then the whole premise of the construction of the certificates by the Court of Appeals fails. On that hypothesis there is no basis for treating the shippers of gigantic cargoes who are required to use a merchant marine consisting of less than one-tenth of the world's shipping fleet as "similarly situated" to shippers who may ship under any flag.

The Government had no such concept of the case in the Court of Appeals. There its plea was grounded on the Shipping Act of 1916, on cases saying that that Act was to be construed like the Interstate Commerce Act and on cases under the Interstate Commerce Act such as *Wight* v. *United States*, 167 U. S. 512 (1897). The opinion of the Court of Appeals adopted these arguments.

District Court, ICA issued new regulations effective November 1, 1964 providing, with regard to "Maximum Liner Rates," and insofar as relevant here, that such rates must not exceed "the lowest rate charged by the carrier for similar shipments on the same voyage." CFR §201.67(a)(4)(iii). However, many of the private shipments involved here were not on the same voyage as the Government aided shipments. As we read the decision of the Court of Appeals, it does not lend itself to the limited interpretation on which the Government now seeks to avoid review.

We can only suspect that, having won the case in the Court of Appeals on one theory, the Government now seeks to avoid review by this Court on another.

The Government says (page 3) that the Cargo Preference Act "plainly does not establish that American-flag ships were accorded an unconditional license to charge higher rates for government-financed shipments than for private shipments."

The Cargo Preference Act required that one-half the enormous shipments of Government-aided bulk grain be by U. S.-flag carriers. The inevitable consequence was—under the law of supply and demand—a rate differential vis-a-vis shippers not so required, a result Congress anticipated and both Congress and the executive departments thereafter recognized.

This case does not present the question whether U. S.-flag carriers can charge, for Government-aided cargo, rates higher than world market rates for private cargo—that right is not challenged; what is presented is the question whether, doing so, they can also carry private cargo at world market rates.

We can not believe that Congress intended by the Cargo Preference Act to exclude U. S. flag carriers from the commercial carriage of cargo which, when Government-aided, was carried at the differential rate.

The need is urgent that this Court construe the Cargo Preference Act.

December, 1966

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